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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964 applies only to "employer[s]." Section 701(b) of Title VII defines the term "employer" as a person who is "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). The courts of appeals have adopted two methods of counting hourly paid employees to determine whether a person is an "employer" subject to Title VII. The question presented is:

Whether, for purposes of Section 701(b) of Title VII, an hourly paid employee is counted among a "person's" employees on days when the employee is not at work.

PARTIES TO THE PROCEEDINGS

Darlene Walters and the Equal Employment Opportunity Commission (EEOC) were appellants in the proceedings in the court of appeals. Metropolitan Educational Enterprises, Inc. and Leonard Bieber were appellees below.

Darlene Walters is the petitioner in *Darlene Walters v. Metropolitan Educational Enterprises, Inc.*, No. 95-259. The EEOC is the petitioner in *Equal Employment Opportunity Commission v. Metropolitan Educational Enterprises, Inc.*, No. 95-779. The Court granted the petitions for a writ of certiorari and consolidated the cases on March 18, 1996. ___ U.S. ___, 116 S. Ct. 1260, 134 L.Ed. 209 (1996).

RULE 29.6 STATEMENT

Metropolitan Educational Enterprises, Inc. has no parent companies or subsidiaries to be listed pursuant to Rule 29.6

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1 EEOC Compliance Manual 605.8(b) *Does Respondent Employ 15 or More Employees* (BNA) 605:021 38

3 EEOC Compliance Manual (BNA), *Policy Guidance: Whether part-time employees are within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, N:3311-N:3316 ..... 35, 36

Equal Employment Opportunity Commission, *Legislative History Of Titles VII and XI Of The Civil Rights Act Of 1964* (1968) 22, 25

OPINIONS BELOW

The opinion of the court of appeals (95-259 Pet. App. 1a-12a) is reported at 60 F.3d 1225. The district court's opinion (95-259 Pet. App. 13a-19a) is reported at 864 F.Supp. 71.

JURISDICTION

The court of appeals entered its judgment on July 18, 1995. Darlene Walters filed a petition for a writ of certiorari on August 14, 1995. *Walters v. Metropolitan Educational Enterprises, Inc.*, No. 95-259.

On October 10, 1995 Justice Stevens extended the time for the Solicitor General to file a petition for a writ of certiorari to and including November 15, 1995. The Solicitor General filed a petition for a writ of certiorari on behalf of the EEOC on November 15, 1995. *Equal Employment Opportunity Commission v. Metropolitan Educational Enterprises, Inc.*, No. 95-779.

The Court granted both petitions for a writ of certiorari and consolidated the cases on March 18, 1996. 116 S. Ct. 1260. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964 defines the term "employer" as follows:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . .

42 U.S.C. § 2000e(b).

STATEMENT OF THE CASE

Metropolitan Educational Enterprises sells encyclopedias, dictionaries and other educational materials to retail customers throughout the United States. J.A. 15, 17.[1] Leonard Bieber is the president of Metropolitan. J.A. 23. Darlene Walters worked for Metropolitan as a collector from January 3, 1986 until she voluntarily resigned on Tuesday, April 10, 1990. R. 12 at 2; R. 20 at 7.[2]

On Friday, April 13, 1990, Walters returned to Metropolitan and asked to be rehired. R. 12 at 7-8. Metropolitan allowed Walters to return to work. R. 12, at 7-8. Before she returned to work, however, Walters had filed a charge

[1] Citations to the Joint Appendix are designated "J.A." followed by the page number where appropriate.

[2] Citations to the Record are designated "R. #." References are to the district court's docket sheet and, where appropriate, to the page number.

of discrimination with the EEOC alleging that Metropolitan had denied her a promotion to the position of credit manager on account of her sex in September, 1989.[3] See R. 12, at 3-4; J.A. 20-2; EEOC Brief at 3.

On Monday, April 23, 1990, Metropolitan terminated Walters for unsatisfactory job performance. R. 12 at 7-8. Walters filed a second charge of discrimination, this time alleging that Metropolitan discharged her in retaliation for having filed the initial charge. R. 12 at 3-4.

Efforts at conciliation failed and the EEOC filed suit against Metropolitan and Bieber in the district court on April 7, 1993. R. 1, at 2. The EEOC alleged that Metropolitan and Bieber had retaliated against Walters in violation of Section 704(a) of Title VII of the Civil Rights Act of 1964 by discharging her for having filed a charge of discrimination. R. 1 at 3. Walters intervened as a matter of right under 42 U.S.C. § 2000e-5(f)(1) and Rule 24(a)(1) of the Federal Rules of Civil Procedure. R. 10. Her amended complaint reiterated the EEOC's retaliation claim. R. 12 at 3-4. Walters further alleged that Metropolitan had failed to promote her to the position of credit manager solely on account of her sex in violation of Section 703 of Title VII. R. 12 at 2-3. Finally, Walters alleged pendent claims for breach of contract and common law retaliatory discharge under Illinois law. R. 12 at 4-5.

[3] The EEOC investigated this charge and determined that the evidence did not establish a violation because the individual Metropolitan had promoted was better qualified for the job. *See* Walters' Brief at 4 n.3.

Metropolitan and Bieber denied the material allegations of the complaints, including the allegations that each was an "employer" within the meaning of Title VII of the Civil Rights Act of 1964. R. 2 at 3; R. 3 at 3-4; R. 20 at 2; R. 21 at 2. They moved to dismiss the complaints for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. R. 25. They contended that neither Metropolitan nor Bieber was an "employer" subject to the provisions of Title VII.[4] R. 26, at 3.

Section 701(b) of the Civil Rights Act of 1964 defines "employer" to mean "a person engaged in an industry affecting commerce who has at least fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). Respondents argued that Metropolitan did not employ fifteen or more employees on each working day in each of twenty or more calendar weeks in either 1989 or 1990. R. 26, at 3-5.

Respondents relied upon the district court's previous decision in *Norman v. Levy*, 767 F.Supp. 1441, 1449 (N.D.Ill. 1991). In *Norman v. Levy*, the district court applied the counting method that the Seventh Circuit had articulated in *Zimmerman v. North American Signal Co.*, 704 F.2d 353 (7th Cir. 1983). In *Zimmerman*, the Seventh Circuit held that hourly paid workers are not to be counted as "employees for days when they were neither working nor on paid leave." *Id.* at 354. The court reserved and

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[4] Respondents also moved to dismiss Walters' pendent claims for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1367(a). R. 26 at 5-6.

expressed no opinion on several issues that were not necessary for its conclusion. *Id.* at 354 n.6. Those issues included the method of counting *hourly paid workers on paid leave*, and the method of counting salaried workers. *Id.*

Counsel for respondents supervised the review and analysis of Metropolitan's time cards and biweekly payroll worksheets and registers for 1989 and 1990 in accordance with the procedure the district court had previously followed in *Norman v. Levy*.[5] *See* R. 25 following Tab 5. Respondents' counsel oversaw the preparation of a detailed weekly analysis of Metropolitan's payroll records for each calendar week of 1989 and 1990. R. 26 following Tab 5. The worksheets listed the name of each employee on Metropolitan's payroll for each calendar week, and for each day of the week, the number of hours each employee worked or for which he or she received holiday pay, sick pay or vacation pay. *See* R. 26 following Tab 5.

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[5] The district court addressed the proper method of counting employees for purposes of Section 701(b) of Title VII. *Norman v. Levy*, 756 F.Supp. 1060 (N.D. Ill. 1990). There, the court attempted to apply the counting method the Seventh Circuit had articulated in *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983). The district court entered and continued the defendant's motion to dismiss because the evidence the parties initially presented left the court "unable to make a finding either way as to its jurisdiction." *Norman*, 756 F.Supp. at 1065. The court also requested that the parties "submit further evidence and a new employee count" in a manner consistent with the Seventh Circuit's approach in *Zimmerman, id.*

Respondents counted all of Metropolitan's hourly paid employees for each working day they worked, regardless of the number of hours worked. Respondents also counted Metropolitan's hourly employees for each working day they were on paid leave. Metropolitan's only salaried employee, Bieber, was counted for each working day of the year. This approach, while more inclusive than that mandated by the Seventh Circuit's holding in *Zimmerman* produced a similar result. Metropolitan did to have fifteen or more employees at work or on paid leave for each working day in each of twenty or more calendar weeks in either 1989 or 1990. R. 26, at 2-3.

Petitioners successfully moved to strike the weekly payroll analysis respondents' counsel had prepared and then undertook discovery. R. 31; 63-2. Much of the discovery in this case focused upon whether independent sales representative were "emplyees" within the purview of Section 701(f) of Title VII.[6] The remaining discovery consisted of the production of Metropolitan's payroll records.

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[6] Petitioners' request for production called for the production of nearly 3,000 pages of documents. Approximately one half of these documents related to Metropolitan's independent sales representatives. The documents included those individuals' applications and contracts with Metropolitan, their 1099 forms for the years 1989 and 1990, and even records relating to their sales of merchandise and the commissions they earned. Mr. Bieber's deposition lasted for more than two full days, during which much of the petitioners' interrogation centered around the nature of Metropolitan's relationship with its independent sales representatives. Ultimately, Walters stipulated that Metropolitan's sales representatives were not "employees." R. 40 at ¶¶ 2-11.

After completing discovery, the parties prepared a second set of weekly summaries similar to the analysis Metropolitan had appended to its motion to dismiss. J.A. 28-79. Based upon the analysis of Metropolitan's 1990 payroll records, the parties stipulated to the following facts.

> 1. There were only nine calendar weeks during 1990 during which Metropolitan had 15 or more employees working or on paid leave on each working day. J.A. 23-24 at ¶ 11.
>
> 2. During the remaining 43 calendar weeks of 1990, Metropolitan did not have 15 or more employees working or on paid leave on each working day. J.A. 24 at ¶ 11.
>
> 3. Finally, there were 15 or more employees on Metropolitan's payroll during 47 calendar weeks of 1990. J.A. 24 at ¶ 12.

The parties submitted the weekly summaries and their stipulations to the district court. 95-259 Pet. App. 15a. The EEOC urged the court to count the number of employees on Metropolitan's payroll. R. 38, at 5-7. The district court noted that circuit precedent supported respondents' counting method and granted their motion to dismiss. 95-259 Pet. App. 13a-19a.

The court of appeals affirmed. 95-259 Pet. App. 1a-12a. The court reaffirmed its earlier holding in *Zimmerman id.* While *Zimmerman* gave the phrase "for each working day" "its most natural interpretation." The panel rejected the petitioners' proposed interpretation of the phrase "for each working day" finding it "highly unlikely" because the "instances where employees begin work on Wednesdays or depart on Thursdays are

unlikely to occur with sufficient frequency to merit inclusion in a federal antidiscrimination statute." *Id.*

SUMMARY OF THE ARGUMENT

Congress defined "employer" to limit the application of Title VII to those persons who "ha[ve] fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). The plain language of the definition is correctly interpreted to count employees for each day when they are at work. The payroll method urged by the petitioners, on the other hand, renders the phrase "for each working day" meaningless. Petitioners' inconsistent interpretation of the payroll method illustrates its failure to give the phrase "for each working day" the meaning they ascribe.

In the absence of a clear legislative intent to the contrary, the definition must be interpreted as it was written. The sparse legislative history that relates specifically to the phrase "for each working day" does not support petitioners' interpretation. The daily method is consistent with congressional intent to exclude small employers from Title VII. Since the definition is jurisdictional, it should be strictly construed.

This Court owes no deference to the EEOC's interpretation. As noted above, the language of the statute is plain and it defines the scope of the EEOC's jurisdiction. Finally, the EEOC's interpretation of the payroll method has been inconsistent, even during this course of this

litigation. Thus, deference to its Policy Guidance would be inappropriate.

ARGUMENT

I. While The *Zimmerman* Method Is Consistent With The Plain Meaning Of The Statute And Gives Effect To The Phrase "For Each Working Day," The Payroll Method Does Not.

Petitioners contend that the plain meaning of Title VII supports the payroll method. They maintain that the payroll method's emphasis upon the existence of the employment relationship gives effect to the phrase "for each working day." The petitioners' proposed interpretation does not comport with the common understanding of the plain language of the statute. Indeed, their interpretation renders the phrase "for each working day" superfluous. Moreover the petitioners' application of the payroll method fails to give effect to their proposed interpretation of the phrase "for each working day." Finally, the fact that Title VII has a remedial purpose is insufficient to overcome the meaning of the plain language of the statute.

A. The Plain Language Of Title VII Supports The Interpretation Of The Courts Below And Militates Against The Payroll Method.

When interpreting a statute, a court must begin with the language of the statute itself. *E.g., Estate of Cowart v. Nickols Drilling Co.*, 505 U.S. 469, 476 (1992); *Consumer*

Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). If the statute is clear and unambiguous, as it is in this case, the language must be regarded as conclusive and judicial inquiry into the meaning of the statute is finished. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). For purposes of Title VII, Congress defined an "employer" as "any person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks." 42 U.S.C. § 2000e(b). Petitioners rely heavily upon the definition's use of the verb "has" to conclude that the definition contemplates the existence of an employment relationship. The definition might be construed as petitioners suggest, at least when the verb "has" is read in isolation. But statutory language must not be read in isolation because its meaning depends upon its context. *Shell Oil Co. v Iowa Department of Revenue*, 488 U.S. 19, 25 (1988). Judge Learned Hand explained this cardinal canon of statutory construction as follows:

> "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used."

NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941). Thus, the "relevant phrase in the definitional part of the statute must be read in its entirety." *Gustafson v. Alloyd Co., Inc.*, ___ U.S. ___, 115 S.Ct. 1061, 1069 (1995).

Title VII's definition of "employer" does not speak merely in terms of the number of employees a person "has." When read in its entirety, the definition speaks in

terms of the number of employees a person "has" "for each working day in each of twenty or more calendar weeks." Respondents' interpretation of the definition is consistent with, and gives meaning to the plain language of the statute. Petitioner's interpretation, on the other hand, renders the phrase "for each working day" meaningless surplusage. In an attempt to avoid that result, petitioners ascribe a strained meaning to the phrase "for each working day," suggesting that the phrase excludes employees whose "employment relationship" began or ended during a calendar week. *See* EEOC Brief at 22; Walters' Brief at 22-23. The Seventh Circuit rejected this interpretation as "highly unlikely." The court found that the instances of employees beginning or ending work midweek were "unlikely to occur with sufficient frequency to merit inclusion in a federal anti-discrimination statute." *EEOC v. Metropolitan Educational Enterprises, Inc.*, 60 F.3d 1225, 1228 (7th Cir. 1995).

In common parlance, if an employer were asked how many employees he "has" on any given day, he would probably count the time cards next to the company's time clock. The resulting count would include each hourly-paid employee, whether he worked that day or not, and if so, without regard to the number of hours worked. This counting method would necessarily exclude any individual who was not in an employment relationship with the employer on a given day. Thus, persons who had not yet begun, or who had already terminated their employment relationship with the employer, would not be counted. If the employer repeated this process for each working day of a given week, the resulting tally would include each hourly-paid employee with whom the employer had an

employment relationship without regard to the number days or hours that employee actually worked during the week. This method would produce the same result as the payroll method petitioners' now propose before this Court. Thus, petitioners' suggested interpretation of the phrase "for each working day" adds nothing to Title VII's statutory definition of "employer." Courts should not construe a statute in a way that renders words or phrases meaningless, redundant or superfluous.

But if the same employer were asked how many employees he or she "has" "for each working day in [a given] calendar week," he would probably adopt a different counting method. The employer would probably gather the company's time cards for the week in question and then, "for each working day," tally the number of employees who actually worked – even if for only a portion of the day. The Seventh Circuit found this to be "the most natural interpretation of the phrase ['for each working day']." *EEOC v. Metropolitan Educational Enterprises, Inc.*, 60 F.3d 1225, 1228 (7th Cir. 1996); *see also Zimmerman v. North American Signal Co.*, 704 F.2d 347, 353-54 (7th Cir. 1983).

B. Petitioners' Application Of The Payroll Method Is At Odds With Their Interpretation Of The Payroll Method Before This Court And Fails To Give Effect To The Phrase "For Each Working Day."

Walters offers two examples to illustrate how application of the payroll method gives effect to the phrase "for each working day." In Walters' first scenario, a new

employee is hired and begins working on Tuesday. Walters' Brief 22. Because he did not start work until Tuesday, this individual was not an employee "for each working day" of the "calendar week." Accordingly, this individual would not be counted in the week he began his employment. Walters' Brief at 22. The second hypothetical involves an employee who terminates her employment on a Thursday. Walters' Brief at 22. Since the employee terminated her employment on the fourth "working day" of the "calendar week," she was not an employee "for each working day" of that week. Thus, she should not be counted in the week her employment was terminated. Walters' Brief at 22-23.

Petitioners took a decidedly different approach when they applied the payroll method in the courts below. Each of the weekly payroll summaries included in the Joint Appendix indicates the "Number of Employees on [Metropolitan's] Weekly Payroll." *See, e.g.*, J.A. 43. For each and every week, the number indicated corresponds to number of persons whose names appeared on Metropolitan's payroll. Thus, petitioners counted employees who began employment after Monday and those who terminated their employment before Friday just as if their employment relationship existed "for each working day" of the calendar week their employment began or ended. Petitioners' own application of the payroll method in this case renders the phrase "for each working day" meaningless. Moreover, their application of the payroll method is at odds with the interpretation they now ascribe to that phrase in this Court.

Petitioners' analysis of the week beginning April 23 best illustrates their application of the payroll method in

the courts below. Metropolitan began that week with fifteen persons on its payroll. *See* J.A. 43. There were two "midweek employment changes"[7] during that week. Petitioner Walters was terminated on Monday April 23. (J.A. 44) Since her employment relationship with Metropolitan ended on the first "working day" of the week, Walters no longer stood in an employment relationship with Metropolitan for the remaining four "working days" of the "calendar week." *Cf.* Walters' Brief at 22-23. Metropolitan had an ongoing employment relationship with only 14 employees "for each working day" during the rest of that week. Shyanne Davis began working for Metropolitan on Thursday, April 26 – the fourth "working day" of the "calendar week." Walters' Brief at 11; (J.A. 44). Thus, like Walters, Davis did not have an employment relationship with Metropolitan "for each working day" of that calendar week. *Cf.* Walters' Brief at 22. Nevertheless, petitioners counted both Walters and Davis "for each working day" of the calendar week of April 23 when neither had an employment relationship with Metropolitan "for each working day" of that week. As a result, the weekly payroll summary indicates that Metropolitan had 16 employees "on [its] weekly payroll," when it had an employment relationship with only 14 employees "for each working day" during that week. *See* J.A. 44. Petitioners included this week among those they maintain should be counted toward the jurisdictional minimum. *See* J.A. 24-25 at ¶ 12 ("there were fifteen (15) or more

[7] Petitioners use this term to describe those situations in which an employee either joins or leaves an employer's workforce midweek, *i.e.*, other than starting on Monday or leaving on Friday. Walters' brief at 10, 22-23.

employees *on [Metropolitan's] payroll* during each of the following calendar weeks: . . . April 23 to April 27. . . . ") (emphasis added). Contrary to the position they take before this Court, Petitioners consistently counted employees for each week their names appeared on the payroll, including weeks when an employee did not stand in an employment relationship with Metropolitan "for each working day" of the week.[8] Petitioners' application of the payroll method in the courts below stands in

[8] The week beginning April 2, 1990 again illustrates how the petitioners' application of the payroll method erroneously increased the jurisdictional count. James Frawley left Metropolitan's employment on Monday April 2, 1990 – the first "working day" of the calendar week. (JA 41); *see also* Walters' Brief at 11. After Mr. Frawley had terminated his employment, Metropolitan had only fourteen employees on its payroll for each of the remaining days of the week. Yet, petitioners counted Mr. Frawley as the pivotal fifteenth "for each working day" of the remainder of the week, apparently ignoring the fact that his "employment relationship" had been terminated. *See* (JA 53) ("Number of Employees on Weekly Payroll – 15") (JA 24-25 at ¶ 12) (counting the week of April 2 through April 6 among the weeks "there were fifteen (15) or more employees *on [Metropolitan's] payroll.*") (emphasis added.)

The week of June 11 provides yet another example. Metropolitan began that week with a total of fourteen employees on its payroll. (JA 51) Wayne Sallee began working for Metropolitan on the last working day of the week – Friday June 15. (JA 51); *see also* Walters' Brief at 11. Since Metropolitan and Mr. Sallee did not have an employment relationship "for each working day" of the week of June 11, petitioners should not have counted him for that week. *See* Walters' Brief at 22, 25. Nevertheless, petitioners counted Mr. Sallee as Metropolitan's fifteenth employee "for each working day" of that week, thereby adding yet another week to their jurisdictional count. *See* JA at 51 ("Number of Employees on Weekly Payroll – 15"); (JA at 24-25 ¶ 12) (counting the week of June 11 to June 15

stark contrast to the payroll method petitioners espouse before this Court.

C. Settled Principles Of Statutory Construction Favor A Strict Construction Of Section 701(b) And Militate Against The Payroll Method.

Petitioners urge this Court to construe the definition of "employer" liberally because Title VII is a remedial statute. Their analysis overlooks the plain meaning of the

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among the weeks when "there were fifteen (15) or more employees *on [Metropolitan's] payroll*") (emphasis added).

The stipulations and weekly summaries printed in Joint Appendix reveal that for each week a person either started or left Metropolitan's employ, petitioners' application of the payroll method contradicts the position they have taken before this Court. Aaron Hunter left Metropolitan's employ on Thursday, June 28; yet, petitioners counted him as Metropolitan's fifteenth employee for "each working day" of that week. *See* Walters' Brief at 11; (JA 53); (JA 24-25 at ¶ 12). Joseph Wilds left Metropolitan on Thursday, July 19. (JA 56) Still, petitioners counted him "for each working day" of that week. *See* Walters' Brief at 11. (JA 24-25, 56). Lizbet Thome-Steiner's last day with Metropolitan was Monday, August 20. Walters' Brief at 11; (JA 61). Petitioners counted her "for each working day" through Friday, August 24. (JA 24-25, 61). On Friday October 5, Derek Gendron and Scott Gibson began working for Metropolitan. Walters' brief at 11; (JA 67). Once again, petitioners counted both of these individuals "for each working day" of a week even though their employment relationship with Metropolitan did not begin until Friday - the last "working day" of that week. (JA 24-25, 67). Finally, Paul Slevin left Metropolitan on Thursday, December 13, (Walters' brief at 11; (JA 77)), but was counted "for each working day" of that week (JA 24-25, 77).

statute and invites an unwarranted expansion of federal subject matter jurisdiction.

Title VII is indeed remedial legislation. Generalized references to the remedial purposes of a statute do not afford the judiciary sufficient justification to read a provision more broadly than its language permits. *Aaron v. SEC*, 446 U.S. 680, 695 (1980); *see also* 3 N. Singer, *Sutherland's Statutory Construction* § 60.01 at 148 (1984). As respondents have demonstrated, the plain meaning of the statute supports their interpretation of the definition of "employer." This Court should therefore decline petitioners' invitation to read that provision more broadly than Congress intended.

Moreover, a person's status as an "employer" determines whether an employee is entitled to a federal forum for redress of discrimination in employment. Thus, section 701(b) of Title VII is not only a definitional statute, but in a broader sense, a jurisdictional one.[9] As such, it must be strictly construed. *E.g., Healy v. Ratta*, 292 U.S. 263, 270 (1934) (federal courts should "scrupulously confine their own jurisdiction to the precise limits" defined by Congress.) This Court has expressed its "deeply felt

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[9] Title VII's strictures against discriminatory and retaliatory conduct retaliation apply only to "employers," as that term is defined in Section 701(b). *See* 42 U.S.C. §§ 2000e-2(a); 2000e-3(a). Section 706(f)(1) authorizes the EEOC to bring a civil action to redress alleged violations of Title VII. 42 U.S.C. § 2000e-5(f)(1). Section 706(f)(3) vests the district court with jurisdiction of actions commenced under Title VII. 42 U.S.C. § 2000e-5(f)(3). Thus, whether the EEOC may commence an action in the district court depends upon whether the putative defendant is an "employer."

and traditional reluctance . . . to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959). Guided by these cardinal canons of statutory construction, the Fifth Circuit strictly construed Title VII's definition of "employment agency" in *Greenlees v. Eidenmuler*, 32 F.3d 197, 200 (5th Cir. 1994). This Court should decline petitioners' invitation to expand federal subject matter jurisdiction by construing the definition of "employer" more broadly than its plain meaning permits.

II. The Legislative History Of Title VII Does Not Provide A Clear Indication That Congress Intended That The Payroll Method Be Applied.

The plain meaning of Title VII's definition of "employer" supports respondents' view that hourly-paid employees be counted only on those days when they actually work. Accordingly, consideration of legislative history is neither useful nor appropriate. *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987).

Should this Court conclude that exceptional circumstances warrant its consideration of legislative history to ascertain Congressional intent, it should proceed with caution. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977). Petitioners present a lengthy analysis of the legislative history of Title VII. Stripped of its irrelevant detail, petitioners' argument rests on a few passing general references in the legislative debates. Much of the legislative history Petitioners' rely upon preceded the Senate

amendment that added the phrase "for each working day in each of twenty or more calendar weeks." The history of that amendment is sparse. And what little history there is provides no specific explanation for the phrase "for each working day." The history does, however, reveal a broader Congressional intent to count hourly-paid workers only when they actually work.

A. The Legislative History Of Title VII Lacks The Sources Of Congressional Intent This Court Has Historically Deemed Authoritative – Reports Of Congressional Committees That Drafted And Studied The Legislation.

Title VII traces its roots to H.R. 7152, 88th Cong., 1st Sess. (1963), a bill introduced in the House of Representatives on June 20, 1963.[10] On February 10, 1963, the House passed a version of the bill that defined"employer" as:

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[10] A subcommittee of the Judiciary Committee of the House of Representatives prepared a substitute for H.R. 7152. After offering the substitute and moving for its approval, the Chairman of the Judiciary Committee announced that no amendments to his proposal could be offered, that no debate would be had and that no questions would be permitted or answered. H.R. Rep. No. 914, 88th Cong. , 1st Sess. 63 (Minority Report Upon Proposed Civil Rights Act Of 1963, Committee On Judiciary Substitute For H.R. 7152). The bill was read without opportunity for amendment. *Id.* Several members of the committee repeatedly sought recognition to ask questions or offer amendments, but the Chair refused to recognize those members of the committee. *Id.* In all, the bill was discussed for a total of only two minutes, with one minute being allotted to the ranking minority member and the other reserved to the Chairman. *Id.* Neither of these members yielded to any other member of the committee. *Id.* Both the Chairman and the ranking member of the minority confined their terse remarks to

> "a person engaged in an industry affecting commerce who has twenty-five or more employees, and any agent of such a person . . .

H.R. Rep. No. 914, 88th Cong., 1st Sess. 9 (1963). The EEOC maintains that several Congressmen understood this definition of "employer" to include all employees on an employer's payroll regardless of their work schedules.[11]

Four months after the House had adopted H.R. 7152, the Senate amended the definition of "employer" by adding the phrase "for each working day in each of twenty or more calendar weeks." *See* Amendment No. 656 to H.R. 7152 in the Nature of a Substitute, *reprinted at* 110 Cong. Rec. 11,926 (1964); *see also* 110 Cong. Rec. 12,811-12,817 (1964) (text of H.R. 7152 annotated to indicate changes made by Senate amendment No. 656). Common sense dictates that whatever might be gleaned from several Congressmen's interpretation of H.R. 7152 *before* it was amended in the Senate provides little evidence of what Congress intended when it adopted the Senate amendment to the definition of "employer." Put another

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their support of the bill. *Id.* During the brief discussion of the bill, there was no attempt to explain the provisions of the bill. *Id.* The committee neither debated nor permitted the opportunity to debate the bill. *Id.*

[11] This interpretation appears to be consistent with the plain language of H.R. 7153 as it was reported and passed by the House. Moreover, this interpretation of the definition of "employer" *without* the phrase "for each working day" is also consistent with Petitioners' application of the payroll method in the courts below.

way, whatever Congressman Abernathy and his colleagues understood H.R. 7152 to have meant *before* the Senate amended the bill could not have reflected what Congress intended when it added the phrase "for each working day."

The EEOC's reliance upon the legislative history before the Senate amendment added the phrase "for each working day" is misplaced. This Court has accorded little weight to the isolated remarks of a single legislator. *E.g., Weinberger v. Rossi,* 456 U.S. 25, 35 (1982). Nor has the Court accorded much weight to the statements of a bill's opponents. *Shell Oil Co. v. Iowa Department of Revenue,* 488 U.S. 19, 29 (1988).

Nor does legislative history of the Senate amendment to H.R. 7152 provide any authoritative indication of what Congress meant when it added the phrase "for each working day" to the definition of "employer." When faced with questions of legislative intent, this Court has demonstrated its strong preference for Congressional Committee Reports over the isolated remarks of legislators during debate. Repeatedly, the Court has recognized that "the authoritative source for legislative intent lies in the Committee Reports on [a] bill." *E.g., Thornburg v. Gingles,* 478 U.S. 30, 43 n. 7 (1986); *Garcia v. United States,* 469 U.S. 70, 76 and n. 3 (1984); *Zuber v. Allen,* 396 U.S. 168, 186 (1969). The Court's reliance upon committee reports rests upon the following rationale:

> A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.

Zuber v. Allen, 396 U.S. at 186 (1969). The legislative history of Title VII does not include a single committee report that explains why Congress added the phrase "for each working day" to the definition of "employer."[12] Even Senator Dirksen, one of the co-sponsors of the bill, attributed his own confusion to the absence of Senate committee hearings and reports. 110 Cong. Rec. 6450, 7215-7216 (1964).[13] Most notably missing from the

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[12] After H.R. 7152 passed the House it was referred to the full Senate rather than to the Senate Judiciary Committee as was the usual and customary procedure. The EEOC's editorial commentary to its *Legislative History of Title VII* suggest that supporters of the measure in the Senate considered members of the Judiciary Committee hostile to the bill. Equal Employment Opportunity Commission Legislative History of Titles VII and XI of the Civil Rights Act of 1964. As a result, there is no report from the Senate Judiciary Committee. The Dirksen-Mansfield amendment was the product of an informal bipartisan conference. *Id.* at 3001. Accordingly, no committee reported on the Senate substitute. Since the Dirksen-Mansfield substitute amended the House Bill, a conference committee would have resolved any differences between the bills including the Senate amendment adding the phrase "for each working day." No conference report was ever prepared. Thus, what would have been the most illuminating source of legislative history is lacking. *Id.* at 3001; 2A N. Singer, *Sutherland's Statutory Construction*, § 48.08 at 340 ("Since the conference report represents the final statement of terms agreed to by both houses of Congress, next to the statute itself, it is the most persuasive evidence of Congressional intent.")

[13] "Reliance upon legislative history is hazardous at best, but when 'not even the sponsors of the bill knew what it meant,' . . . such reliance cannot form a reasonable basis on which to interpret the text of a statute." *Westside Community Schools v. Mergens*, 496 U.S. 226, 242-43 (1990) Title VII's legislative history has similarly frustrated some courts. In

legislative history is a conference report reconciling the differences between the House Bill without the phrase "for each working day" and the Senate substitute including the amendment. Courts and a leading commentator agree that "the Conference Report . . . is the most persuasive evidence of congressional intent besides the statute itself." *E.g., Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 421 (7th Cir. 1993); *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C.Cir. 1981); 2A N. Singer, *Sutherland's Statutory Construction*, § 48.08 at 340.

The only remaining source of legislative history consists of the isolated remarks of Senator Dirksen during the Senate debate. Walters erroneously characterizes Senator Dirksen's remarks as the "most powerful and persuasive history imaginable." Walters' Brief at 37. Unlike committee reports, floor debates merely "reflect at best the understanding of individual Congressmen." *Zuber v. Allen*, 396 U.S. at 186 (1969). Justice Jackson cautioned against reliance upon such debates, noting that Congressional debate is "not always distinguished for candor or accuracy." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring); Guided by these principles, this Court has historically accorded little weight to the comments of even the sponsor of legislation. *E.g., Weinberger v. Rossi*, 456 U.S. 25, 35 and n. 15 (1982); *Consumer Product Safety Commission v. GTE*

Sanchez v. Standard Brands, Inc. 431 F.2d 455, 460 (5th Cir. 1970), for example, the court found that "the legislative history of Title VII is in such a confused state that it is of minimal value in its explication." *See also EEOC v. Missouri Pacific Railroad Company*, 493 F.2d 71, 74 (8th Cir. 1974).

Sylvania, Inc., 447 U.S. 102, 118 (1980); *Chrysler Corp. v Brown*, 441 U.S. 281, 311 (1979). A thorough analysis of Senator Dirksen's remarks in their context fails to clarify what Congress intended when it inserted the phrase "for each working day."

Senator Dirksen explained that the amendment grew out of his concern that the definition might not be sufficiently specific. 110 Cong. Rec. 6450, 7216 (1984)[14]. In particular, the Senator was concerned that agricultural and seasonal employers, who might augment their workforce for only a few weeks of the year, would be subject to Title VII. 110 Cong. Rec. 6450 (1964).

Senator Dirksen later explained that the amendment was intended to exempt such employers:

> [T]he House bill was modified in some particulars. In the first place, we undertook to provide for seasonal workers, by taking the language out of the Unemployment Compensation Act, to the effect that the definition of the term "employer" would apply to 25 or more who were employees for each working day, in each of 20 or more calendar weeks, in the current or preceding calendar year.

110 Cong. Rec. 13087 (1964). The phrase "in each of twenty or more calendar weeks" was plainly intended to exempt seasonal employers from Title VII. How the

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[14] Senator Dirksen raised a number of questions concerning the specificity of the definition of employer. 100 Cong. Rec. 6450 (1964). He later drafted a memorandum setting forth his specific questions and concerns. 100 Cong. Rec. 7216-7217 (1964).

phrase "for each working day" also furthers that legislative purpose is entirely unclear.

Petitioners and some of the lower courts[15] have seized upon Senator Dirksen's isolated remark[16] that Congress had borrowed the definition from the Unemployment Act. As at least one lower court has recognized, "Senator Dirksen's assertions . . . are not borne out in the comparison" of the two provisions. *Richardson v. Bedford Place House Phase I Associates*, 855 F.Supp. 366, 369 (N.D. Ga. 1994). The Unemployment Act stated:

> [T]he term "employer" does not include any person unless *on each of some twenty days during the taxable year, each day being in a different calendar week;* the total number of individuals who are *employed by him in employment for some portion of the day* (whether or not at the same moment in time) was four or more."

26 U.S.C. § 3306(a) (1958) (emphasis added). Neither the phrase "for each working day," nor the phrase "in each of twenty or more calendar weeks" appears in the Unemployment Compensation Act. Their conspicuous absence casts serious doubts upon their assumed parentage. But Senator Dirksen had quoted the latter phrase from the

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[15] *E.g., Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634-635 (1st Cir. 1983); *see also Vera-Lozano v. International Broadcasting*, 50 F.3d 67, 70 (1st Cir. 1995).

[16] According to the EEOC, the Senate debate on H.R. 7152 spanned 83 days and lasted 534 hours, 1 minute and 37 seconds. *EEOC's Legislative History Of Title VII* at 11. This passing reference seems to be Senator Dirksen's most detailed exposition on the meaning of the phrase "for each working day."

Illinois Fair Employment Practices Act. 110 Cong. Rec. 6450 (1964).[17] The Senator's statement does not constitute such a "clearly expressed legislative intention" to adopt the payroll method to override the plain language of the statute. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). To the contrary, the Senator's isolated remark appears to be something less than accurate, and thus serves as a rather flimsy basis for this Court to undertake a function best left to Congress. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (Jackson, J., concurring) ("casual statements from floor debates [are] not always distinguished for . . . accuracy. . . . ") Senator Humphrey explained the basis for the amendment in terms suggestive of an employers output, stating that once the number of employees exceeds 25 "they get into some reasonable degree of gross product in terms of income or output or salaries or goods or services." 110 Cong. Rec. 13.088 (1964). An employee generates "income or output or . . . goods" only when he is present at work. Thus the phrase "for each working day" evinces an intention to limit the application of Title VII by counting employees only when they are at work.

Petitioners further attempt to divine Congressional intent from a Revenue Ruling that addressed the proper

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[17] The Illinois Fair Employment Practice Act provided:

> (d) "Employer" includes and means all persons, including any labor organization, labor unions, or labor association employing more than 100 persons within the State within each of 20 or more calendar weeks, within either the current or preceding calendar year prior to January 1, 1963.

110 Cong. Rec. 6450 (1964).

method for counting employees under the Unemployment Compensation Act. Rev. Rul. 55-19, 1955-1 C.B. 496-99, *reprinted at* J.A. 80-85. As respondents have demonstrated, petitioners' reliance upon Revenue Ruling 55-19 proceeds from a false premise. Moreover, reliance upon Ruling 55-19 would exalt an administrative interpretation and abrogate the Constitutionally appointed role of the judiciary. Where Congress adopts a *judicially* defined concept, a court is justified in presuming that Congress intended to adopt the judicial interpretation of that concept. *Davis v. Michigan Department of Treasury*, 498 U.S. 803, 813 (1989) Revenue Rulings are not judicial interpretations and they do not have the force of law. *Dixon v. United States*, 381 U.S. 68, 73 (1964). A revenue ruling represents nothing more than the Commissioner's position with respect to a particular factual situation. *E.g., Segel v. Commissioner*, 89 T.C. 816, 847 (1987). Accordingly, Courts have recognized that revenue ruling has no more binding or legal effect than would the opinion of any other lawyer. *Kaiser v. United States*, 262 F.2d 367, 370 (7th Cir. 1958); *Browne v. Commissioner*, 73 T.C. 723, 731 (1980) (Hall, J., concurring)

Because revenue rulings lack the force and effect of law, this Court need not, and indeed should not, adopt the fictitious assumption that Congress intended to adopt the Unemployment Act's interpretation of "employer." Neither Senator Dirksen's comments nor any of the other relevant legislative history show that Congress was aware of Revenue Ruling 55-19, much less that it considered the ruling. Senator Dirksen stated only that he "went through the matter with the Department of Labor and others." 110 Cong. Rec. 13087 (1964) From this remark,

Walters concludes the Senator was aware of Revenue Ruling 55-19. The Department of Labor is not empowered to issue Revenue Rulings. And the Senator did not identify the "others" with whom he conferred. There is simply no foundation for such speculation.

Finally, had Congress in fact considered the import of Revenue Ruling 55-19, it would have reached the inescapable conclusion that the ruling had no binding force or effect whatsoever with regard to the interpretation of the Unemployment Compensation Act. The Introduction to the Cumulative Bulletin for 1955, provided following statement explicit limiting the force and effect of the Commissioner's rulings:

> Revenue Rulings reported in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury Decisions), but as published precedents to be used in the disposition of other cases, and may be cited and relied upon for this purpose. *However, since each published ruling represents the conclusion of the Service as to the application of the law to the entire state of facts involved,* Revenue officers *and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same.* In applying rulings, consider the effect of subsequent legislation, regulations, court decisions and rulings.

1955-1 C.B. at 1 (emphasis added). Had Congress searched for a judicial authority that had followed, or even cited the Ruling in 1963, it would have found none. Finally, this Court had already declared that revenue

rulings lacked the force and effect of law. *Bartels v. Birmingham,* 332 U.S. 126, 132 (1947). Thus, Petitioners' suggestion that intended the term "employer" to receive the same interpretation accorded under the Unemployment Act proceeds from an utterly false premise and must be rejected.

Finally, Revenue Ruling 55-19 employed a counting method that is neither internally consistent nor consistent with the petitioners' payroll method. Petitioners cite the ruling as the "settled administrative interpretation" which explained that an employment relationship continues to exist "so long as the parties intend for the employee to continue to work . . . in the future *such that the relationship has not been definitely terminated."* EEOC Brief at 30-31. The ruling addressed the question of how to count an employee who had accrued vacation time at the time he resigned. Rev. Rul. 55-19, 1955-1 C.B. 496, 497 (J.A. 82). According to the IRS, such an individual would be "considered as being in the employ of the employer *during the vacation period." Id.* (emphasis added). The verb "resign" is commonly understood to mean that a person has definitely terminated his or her employment relationship. *See American Heritage Dictionary* 1051 (2d Ed. 1982) (def. 3: defining "resign" to mean "[t]o give up one's job or office; quit, esp. by formal notification.) Counting an employee during the existence of an ongoing employment relationship and doing so after the employee has resigned are irreconcilable. Moreover, whereas the IRS counted both employees for the first week "during the vacation period," petitioners would not count either of them because neither was an employee "for each working day" of that week. *See* Walters' Brief at 22-23. Finally the

approach the IRS followed in Revenue Ruling 55-19 is also inconsistent with the Department of Labor regulations implementing the FMLA which the petitioners cite as additional support for their version of the payroll method.[18]

In the absence of a clear legislative intent to the contrary, the Act of Congress must be applied as written. *E.g., Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The sparse legislative history of the Senate amendment adding the phrase "for each working day" does not provide a clear indication that Congress intended the definition of "employer" to be construed as petitioners suggest.

B. The Legislative History Of The Family And Medical Leave Act Is Not Indicative Of Congressional Intent With Regard To Title VII's Definition Of The Term "Employer."

Petitioners maintain that legislative history of the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.*, supports the adoption of the payroll method when counting employees under Title VII. Walters further contends that the continued application of the day-by-day approach adopted by the courts below will "unsettle" the interpretation of the Family and Medical Leave Act.

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[18] *See* Walters' Brief at 24-25; EEOC's Brief at 35-36 and n.24; *see also* 29 C.F.R. §§ 825.104(a), 825.105(b)-(e), *reprinted at* Pet. Supp. Br. App. 1a-2a.

The EEOC concedes that the 1993 Senate report accompanying the FMLA cannot serve as a reliable indicator of what Congress intended when it enacted Title VII thirty years earlier. *See* EEOC Brief at 33. This Court has spurned attempts to divine of an earlier congress from legislative action taken by a later congress. *E.g., Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989). Remarks in the subsequent legislative history have been accorded even less consideration. For example, in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), this Court found comments in a Committee Report accompanying the 1978 amendments to the ADEA unpersuasive and insufficient to overcome the plain language Congress had given the ADEA in 1967. *Id.* at 758. As the court of appeals correctly observed, the Senate report upon which petitioners rely is not legislation, but merely subsequent legislative history. 60 F.3d at 1228-29 (95-259 Pet. App. at 8a).

Nevertheless, the EEOC cites the Senate Report as an example of the reasonableness of its interpretation requiring application of the payroll method. Petitioners contend that this Court must construe Title VII's definition in the context of the overall body of antidiscrimination legislation. How courts will construe the definition of "employer" under the FMLA is not before this Court. *See* 60 F.3d at 1230 (95-259 Pet. App. at 11a). It appears that no court has addressed the method of counting employees for purposes of the FMLA. It is reasonable to assume that if and when that issue becomes ripe for

adjudication, the court will adhere to established principles of statutory construction and begin with the language of the statute, not with an excerpt from a Committee Report.

While this Court need not address or interpret the FMLA definition, a plain reading of that definition reveals that it does not dictate the payroll approach as petitioners contend. Petitioners note the apparent similarity between the Title VII definition and the FMLA definition, but overlook several important distinctions between the two. Congress did not adopt the FMLA definition from Title VII *in haec verba* as it did when it enacted the ADEA and the Americans With Disabilities Act. Instead, Congress drafted yet another definition of "employer." 29 U.S.C. § 2611(4)(A). Apart from the obvious numerical difference, Congress substituted the verb "employs" for Title VII's use of the verb "has." *See id.* Thus, the FMLA looks to the number of employees a person "employs . . . for each working day." *See id.* Congress further modified the Title VII definition of "employer" by defining the verb "employ" to include "to suffer or permit to work." 29 U.S.C. § 2611(3).[19] Thus, for purposes of the FMLA, an "employer" is a "person" who "suffer[s] or permit[s]" "50 or more employees" "to work" "for each working day during 20 or more calendar workweeks in the current or preceding calendar year." It is difficult to imagine how an "employer" can "suffer or permit" an "employee" "to work" if the employee is not

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[19] Section 101(c) of the FMLA incorporates the definition of the verb "employ" from Section 3(g) of the Fair Labor Standards Act. 29 U.S.C. § 203(g).

physically present at the workplace, wherever that may be. The day-by-day method of counting employees would also seem to be consistent with the plain language of the FMLA. Consequently, the conflict Walters portends is a false one because the payroll method "fits most logically and comfortably into" the FMLA.

III. This Court Owes No Deference To The EEOC's Interpretation Of Its Own Jurisdiction; That Determination Rests Solely With This Court.

Petitioners suggest that this Court should pay deference to the EEOC's interpretation of the statute because the EEOC is charged with the administration and enforcement of Title VII. The issue before this Court transcends the mere arithmetical counting of employees because Section 701(b) defines the EEOC's jurisdiction. This Court has long recognized that "[t]he determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." *Addison v. Holly Hill Co.*, 322 U.S. 607, 616 (1943). Similarly, in *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), the Court explained that "[a]n agency may not finally decide the limit of its statutory power. That is a judicial function." *Id.* at 369.

Petitioners attempt to avoid this result, arguing that since Congress authorized the EEOC to provide interpretations and opinions, it must have also intended that the EEOC should make determinations concerning Title VII's coverage. 42 U.S.C. § 2000e-12(b). This argument must fail because section 713(b) of Title VII says nothing concerning the EEOC's authority to determine employer

coverage. It merely provides a safe harbor for persons who rely upon the Commission's guidance concerning the legality of their employment practices or compliance with Title VII's reporting requirements.[20] That Congress authorized the Commission to issue advisory opinions concerning a person's contemplated action, affords no rationale basis to conclude that it also intended the Commission to determine a person's status as an "employer," particularly in light of the longstanding doctrine of *Addison v. Holly Hill Co.*, 322 U.S. 607, 616 (1943). This Court has rejected such bootstrapping. In *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973), this Court rejected the Commission's interpretation of the scope of its own jurisdiction:

> But the Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. [Citation omitted.] This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that *an agency may not bootstrap itself into an area in which it has no jurisdiction*. . . .

[20] Section 713(b) affords a defense against "any liability or punishment for on or account of (1) the commission by such person of an unlawful employment practice . . . or (2) the failure of such person to publish and file any information required by any provision of [Title VII]." 42 U.S.C. §§ 2000e-12(b)(1); 2000e-12(b)(2).

Id. at 745 (emphasis added). Paying deference to the EEOC's interpretation would permit the EEOC to bootstrap itself into an area into which Congress never intended the EEOC to tread.

To pay deference to the EEOC's interpretation of the definition of "employer" would be to abdicate this Court's constitutional duty to independently survey the bounds of the EEOC's jurisdiction. Finally, the EEOC's interpretation of Section 701(b) would be especially unwarranted because section 701(b), in conjunction with section 706(f)(3) determines the scope of the district court's jurisdiction as well.

IV. This Court Should Give Little Credence To The Commission's Policy Guidance.

The EEOC concedes, as it must, that Congress did not confer upon it the authority to promulgate rules or regulations. *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976).[21] Nevertheless, petitioners contend that this Court owes particular deference to the EEOC's Policy Statement No. N-915-052 (April 20, 1990) (95-259 Pet. App. 30a-40a).[22] The EEOC's guidelines lack the force of law

[21] Section 713(a) of Title VII granted the EEOC limited rulemaking authority that extends only to procedural regulations. *See* 42 U.S.C. 2000e-12(a). The EEOC's regulations implicitly recognize that it lacks the authority to expound on the meaning of terms Congress has already defined. *See* 29 C.F.R. § 1601.2 and § 1601.3 (definitions of various terms including "employer" shall have the meanings set forth in Title VII).

[22] 3 EEOC Compliance Manual (BNA), *Policy Guidance: Whether part-time employees are employees within the meaning of*

and should therefore be accorded less weight than administrative regulations. *Id.*

In *Gilbert*, the Court applied the standard announced in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) to determine how much weight to accord to the EEOC's guideline. In *Skidmore*, the Court explained:

> The weight of such a judgment in a particular case will depend upon the thoroughness of its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 142.

As in *Gilbert*, the EEOC's guideline "does not fare well under these standards." *Id.* The validity of its reasoning is suspect. Petitioners' interpretation demands a strained reading to give meaning to the phrase "for each working day." That reading seems "highly unlikely" (95-259 Pet. App. 6a) and finds no clear support in the legislative history.

Courts have rejected requests for "heightened deference" to an agency's interpretation when the agency's position has been inconsistent. *E.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 4466 n.30 (1987), *quoting Watt v.*

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§ 701(b) of Title VII and § 11(b) of the ADEA, N:3311-N:3316 (95-259 Pet. App. 30a-40a). The "Subject" and "Purpose" of the policy statement reflect confusion between the threshold issue of *whether* a person is an "employee" within the meaning of Section 701(f) who *should* be counted, and the issue before this Court, *viz.*, if so, *how* should the person be counted. *Id.* at N:3313 (95-259 Pet.App.30a).

Alaska, 451 U.S. 259, 273 (1981). Petitioners positions concerning the proper application of the payroll method have been anything but consistent.

Petitioners claim that the interpretation set forth in the EEOC's Policy Guidance dates back to 1966.[23] On closer examination, it appears that the EEOC's current view of the payroll method has not been as long-standing and consistent as petitioners suggest. The EEOC's current Policy Guidance petitioners rely upon was issued on April 20, 1990 – after several courts had rejected the payroll method.[24] The 1990 Policy Guidance was "intended as an amendment and clarification of" the EEOC's earlier interpretation. 95-259 Pet. App. 31a n.1.

Unlike the 1990 Policy Guidance, the EEOC's prior interpretation did not focus on the existence of an employment relationship, but upon the number of days an employee worked. The former interpretation directed investigators to:

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[23] Petitioners cite a May 11, 1996 opinion of the EEOC's general counsel and refer to two other opinion letters that were cited in *Pascutoi v. Washburn-McReavy Mortuary*, 11 Fair Empl. Prac. Cas. (BNA) 1325 (D. Minn. 1975). Neither the EEOC nor Walters cited the General Counsel Opinions in either the district court or in the court of appeals.

[24] *See Zimmerman v. North American Signal Co.*, 704 F.2d 347, 354 (7th Cir. 1983); *McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983); *EEOC v. Argent Industries, Inc.*, 746 F. Supp. 705, 708-09 (S.D. Ohio 1989); *Schoenbaum v. Orange County Center for the Performing Arts*, 677 F.Supp. 1036, 1038-39 (C.D. Cal. 1987).

> count the number of people employed during the year of the alleged violation and the preceding year. If respondent *employed* 15 or more employees *for each working day for* 20 or more calendar weeks in either year, respondent is an employer.

1 EEOC Compliance Manual § 605.8(b) *Does Respondent Employ 15 or More Employees* (BNA) 605:021. The common meaning of the verb "employ" is "[t]o engage the services of; put to work." American Heritage Dictionary 450 (2d ed. 1982). Thus, until 1990 the EEOC's interpretation looked to whether a person had "engaged the services of" or "put to work" 15 or more employees "for each working day for 20 or more calendar weeks." Being "put to work" suggests more than merely being in an employment relationship. In common understanding, being "put to work" contemplates nothing short of actually working for an employer.

The Commission's pre-1990 interpretation included an illustration that also focused upon whether the employees actually "*worked* each working day." 1 EEOC Compliance Manual § 605.8(b) 605:021. *Id.* (emphasis added). The example involved a respondent who had "13 regular full-time employees who *worked all year* . . . with the exception of two weeks [*sic*] vacation each." *Id.* (emphasis added). Respondent also employed 10 part-time and temporary employees, six of whom "*worked each working day* during each of 26 weeks" during the year in question. *Id.*[25] (emphasis added). By "[a]dding these six

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[25] The information for this illustration was obtained by requesting, among other information, "[a] list of respondent's

employees to the 13 regular full-time employees," the EEOC determined that the respondent "*employs* 19 individuals and is an employer within the meaning of § 701(b)." *Id.* (emphasis added). Section 605.8(b) of the earlier version of the EEOC's interpretation made no reference to the existence of an "employment relationship." Nor did it suggest that persons who either began or ended their employment relationship during the week should be excluded from the jurisdictional count for the entire week.

Petitioners have also altered their position with respect to the proper application of method during the course of this litigation. Respondents have previously explained this inconsistency in detail and will refrain from needless repetition. In short, petitioners simply counted the number of names that appeared on Metropolitan's payroll for a given week. This application of the payroll method rendered the phrase "for each working day" meaningless. Petitioners appear to have adopted a slightly different application of the payroll method in this

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part-time and temporary employees" indicating "*how many days or partial days per week each employee worked, which weeks each employee worked, and the total number of weeks each worked.*" 1 EEOC Compliance Manual § 605.8(b) *Does Respondent Employ 15 or More Employees?* 605:0022 (emphasis added). Under the EEOC's current interpretation as set forth in its 1990 Policy Guidance, information concerning the EEOC's current position is that "all part-time employees are counted whether they work part of each day or part of each week, as long as they are on the payroll." 95-259 Pet. App. at 34a. Thus, the number of days or partial days a person worked would be of no relevance in determining the number of employees under the EEOC's current Policy Guidance.

Court. An agency interpretation which conflicts with an earlier interpretation is entitled to "considerably less deference" than a view the agency has held consistently. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987), *quoting Watt v. Alaska*, 451 U.S. 259, 273 (1981); *see also General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976). A request that this Court defer "to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 213 (1988).

CONCLUSION

Respondents, Metropolitan Educational Enterprises, Inc. and Leonard Bieber, respectfully request that the judgment of the court of appeals be affirmed.

Respectfully submitted,

PATRICK J. FALAHEE, JR.
Counsel of Record
53 West Jackson Boulevard
Suite 541
Chicago, Illinois 60604-3607
(312) 322-1103

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